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Govert Haskins, et. al. *v.* John Latour.
Replevin. Plea, property.

NICHOLSON, CH. J.* IT is certainly a general and well established principle that fraud vitiates all contracts. In order, however, to a due application of this principle, it is necessary that the technical sense of the term, *fraud*, should be well understood. There are many transactions, which, in common language, would be called fraudulent, that are not so in a legal point of view. Thus if a man says he has been offered a large sum of money for a piece of property, and thereby induces another to give an extravagant price for it, whenin fact no such offer had ever been made, this certainly would be fraudulent as far as a scandalous perversion of truth could make it so; but no question is better settled than that this is no fraud in a legal view. Or if a person should induce another to

* Absentibus Hollingsworth and Jones.

believe at this time that the decrees of France affecting our commercial interests were repealed, in order to enable him to effect an advantageous sale of tobacco, or coffee, none of us would hesitate to call it a fraud in common conversation, and yet we should hardly be asked to consider it so here for the purpose of annulling the contract which had been made under it, and carried into complete and entire execution.

I take the true rule to be this, as far as a rule can be laid down on a subject so minute in its character, and so various in the numberless shapes it assumes; where property is obtained by artful devices and contrivances, which a man of ordinary capacity, acting with ordinary prudence cannot guard against, the law will consider it fraudulent, and will interfere to relieve the party who has been imposed on.

Let this rule be applied to the present case. Latour in the ordinary course of business, as far as appears in evidence, purchased a quantity of claret from the plaintiffs on a credit of three and four months. The claret was delivered, and the notes executed and delivered. There was no device or contrivance of any kind to deceive the plaintiffs, no artifice used to induce them to sell. They relied on the credit of Latour, such as it was, and if they were not satisfied as to his ability to pay, they might have made enquiries or have asked him for security—if they did make inquiries we presume they were satisfactorily answered. A few days afterwards, however, Latour stopped payment, and the plaintiffs being alarmed, sued out a replevin to regain possession of the claret. Latour then supposing that other creditors might pursue the same course, made a deed of his whole property for the benefit of a few of his creditors, and shortly after published a notice of his intention to apply for the benefit of the In-

solvent Laws. Upon an investigation of his affairs it is now found that when he made the purchase, he was about 79,000 dollars in debt, and that his own property, credits, &c amounted only to 50,000 dollars—In other words, that he was 29,000 dollars worse than nothing. From this it is argued that at the time of the purchase, he must have known his own inability to pay, that he never did intend to pay, and that therefore the purchase was a fraud upon the plaintiffs: that being a fraud the delivery of the claret did not transfer the property, but that it still remained in the plaintiffs and that they of course may recover in this action.

I cannot assent to this doctrine, though it certainly appears to be supported by the decision of my late predecessors in office for whose opinions and legal acquirements I entertain a very high respect, but to whom I cannot surrender my own judgement. When one man sells property to another in the common course of business on a credit, and delivers that property, the contract is executed; and the delivery transfers the property from the vendor to the vendee. The vendor relies on the responsibility of the vendee. It his duty to make himself acquainted with the vendee's character and circumstances: and if he neglects to do so, he must abide the consequences. He is bound to know the remedy given him by the laws of the country on a failure of payment, and if he has mistaken the character of the vendee, he must resort to his remedy.

Let the intentions of the vendee have been ever so bad, the vendor knew that he could compel payment if the vendee had sufficient property. To this he trusted. He cannot set up any pretext that the intentions of the vendee were to deceive when no deceitful artifices were used. He has, in fact, deceived himself by trusting an insolvent man, and shall not be allow-

ed to set that up as a fraud which is imputable only to his own negligence and folly. These principles are fully supported by the case cited by Mr. Justice Buller in 5. T. Reports 231. And no distinction can be drawn between that case and the one at bar, from the circumstances of that being a suit against the assignees of a bankrupt. The assignees of a bankrupt stand in the shoes of the bankrupt himself. They come in as of his estate, and not as purchasers for a valuable consideration. If Latour had committed an act of bankruptcy the day after the purchase and commission of bankruptcy had been awarded against him, there can be no doubt but that the property in the claret would have vested in his assignees. Not because the assignees would have been purchasers for a valuable consideration, for the act of bankruptcy, which might have been a second fraud, could not have legalized the first, but, because the property by the complete and entire execution of the contract had been previously vested in Latour.

In the matter of D. C. Stewart, *et. al.* Petitioners for the benefit of the Insolvent Laws of Maryland.

NICHOLSON, CH. J.* IN the Spring of the year 1806, Messrs. David C. Stewart and Company, being largely indebted to a number of persons, and finding themselves in insolvent circumstances, executed, on the 18th April 1806 a deed of all their property, rights and credits to James Purviance in trust, that he should pay and indemnify the Messrs. Hazlehursts for certain en-

* Abs. Jones J.

gagements, which, in the course of trade they had entered into for David C. Stewart and Co. and further to repay any balance which might afterwards remain to David C. Stewart and Co. These engagements were indorsements of certain promissory notes to the amount of between 19 and 20,000 dollars, which, I presume, are admitted to have been since paid by the Hazlehursts. It is alleged in justification of this deed, that it was made in pursuance of a verbal agreement long before entered into between David C. Stewart and Co. and the Hazlehursts, that each, when occasion required, should become indorsers for the other, and that in the event of a failure of either, the other should be secured in preference to all other creditors.

The question for the decision of the Court is, whether this is "an undue and improper preference of one creditor or security" in contemplation of the act of 1805, to deprive the parties of the benefit of that act.

In the construction of a Statute, there are certain leading, governing rules which ought never to be lost sight of:

1. What the Law was before the Statute?
2. The mischief intended to be remedied, and
3. The remedy which the Statute provides for the mischief.

At Common Law and independent of the several acts for the relief of insolvent debtors, a creditor had almost an unlimited power over his debtor. Not only the debtor's effects in possession, but the future earnings of an industrious life, were subject to the claims of his creditors, and if these were not sufficient to satisfy their demands, the person of the debtor might be immured in jail as long as he lived. If he had made a fair and honest surrender of *all* his property for the benefit of *all* his creditors, and had thus exhausted

his means of payment by discharging all his debts as equally and as fully as he could, the same power of an obdu ate creditor still continued, and one who had received his equal benefit of his debtor's property, might still make requisitions on his person and his future acquirements; thereby cramping the industry of the debtor and repressing that spirit of enterprize which a wise and enlightened policy, will always rather promote than discourage.

Such was the *law*, and such the *mischief* intended to be *remedied*. But the legislature, in providing for the release of the debtor, took care, at the same time, to protect, as far as they could, the interest of the creditors.

Upon looking into the act, it will at once be seen, that the great principle upon which it is founded, is, that the debtor shall surrender *all* his property for the common benefit of *all* his creditors. He can only obtain his discharge on complying with this requisite, and some others of an inferior nature. When he *has* complied, then he is entitled to his discharge.

But the 9th section, provides, that if it shall appear at the time of the debtor's application to the Court, or within two years thereafter that the debtor, prior to his application, had assigned or conveyed any of his property with intent to give an undue and improper preference to any creditor or creditors, or security, that then the debtor shall be forever precluded from any benefit of the act.

It is contended that a debtor's assigning away his whole property for the benefit of particular favoured creditors is a *mere* preference and not an *undue* and *improper* preference. It is not an easy matter to determine what is an *undue* and *improper* preference, as contra-distinguished from a mere preference; but a

case may be supposed where the distinction exists.—A debtor may have one third of his effects in money and the other two thirds in notes payable at a distant day; if he pay his money to one or two particular creditors and surrender his notes for the benefit of the others, there is a preference in point of time and certainty which, perhaps, might not be called undue and improper: or if a debtor has notes payable in a short time, which he transfers to favoured creditors, or gives them merchandize which will readily bring money, and surrenders to other creditors real estate that will pay them only if sold on a credit; this possibly might not be deemed an undue and improper preference, although it is certainly a preference in some degree; but if a debtor gives to one creditor *every thing* he has, leaving all the others without the most remote possibility of ever getting a dollar, how can it be said that this is not an undue and improper preference? If the Legislature did not mean to provide against a case of this kind, those expressions in the act are nugatory, for there can be no instance of undue and improper preference if this is not one.

The Legislature made an innovation on the Common Law by depriving creditors of their Common Law remedy, and by holding out great advantages to the debtor if he would make a fair and honest surrender of all his property for the equal benefit of all his creditors. But they certainly intended to place all creditors on an equal footing by providing for an equal distribution of the debtors effects in proportion to his debts. It could not be their intention to allow him to give a *preference* to *one*, and to *destroy*, at the same time, his *liability* over to the *others*. Such a provision would be iniquitous in the extreme.

The act is intended to confer a benefit on the debtor, and the ground-work of that benefit is a surrender

of *all* his property for the benefit of *all* his creditors. But how is the spirit of the act complied with, when a man assigns the *whole* of his property *to day* to one creditor, and comes in to-morrow offering to surrender that which he has before disposed of and which he *has not*, for the benefit of the others?

It is argued that at Common Law, a man may pay all his property to one creditor, in discharge of a *bona fide* debt, to the exclusion of all the others, and that this act of 1805 does not take away his right of giving a preference. Of this there can be no doubt. It is a right with which the act does not interfere. It only declares, in substance, that if a debtor does insist on, and exercise his Common Law right of preferring one creditor to the exclusion of all the rest, *he must take the Common Law consequences.* His person and his subsequently acquired property must remain liable to the claims of his excluded creditors. But if he comes in and asks for a benefit under this act, if he asks that his person and his subsequently acquired property shall be discharged from antecedent debts, he can only get them discharged by showing that he has complied with all the terms prescribed by the act. One of these, and a principal one is that he shall surrender all his effects in possession, reversion or remainder, and another that he shall not have assigned any part of them away either for his own benefit, or with intent to give an undue and improper preference to one or more creditors or securities. This *intent* in the present case is manifested clearly by the assignment being made at a time, when the parties knew, as their letter shows, that none of their creditors except the Hazlehursts, had the most remote chance of ever being paid any thing.

This assignment has been attempted to be supported, by a reference to English authorities under the bankrupt system, where an assignment of *a part* of the bankrupt's effects in discharge of a *bona fide* debt has been sustained; but I think the most laborious research may be defied to produce a single instance, in which the assignment by the debtor of his whole effects, to one or more creditors in exclusion of all the rest, has been sustained, when the assignment was made at a time that the debtor knew of his own insolvency and with no other intent than to give a preference.

The agreement that is said to have existed between David C. Stewart and Co. and the Hazlehursts can have no influence in this case. It is a sufficient answer to it, to say that it was *secret*, and that there is no Court of Equity that would enforce it. If it was not binding on the *parties*, it can hardly be insisted on to the injury of *third persons* who gave a credit without knowing that there was such an agreement. I think I may add, that if such an agreement was known to exist between any two houses in Baltimore, and it was known to be binding, the credits of those houses would sink instantaneously.

This subject has been considered above without any reference to the act of 1807, which is a supplement to the Insolvent Law, and declares that any deed, conveyance, transfer, &c. of any property, debts, rights, or claims to any creditor, security, &c. by any person with a view or expectation of becoming an insolvent debtor, shall be, and the same is declared to be, an *undue* and *improper* preference, within the intent and meaning of the 9th section of the original act.

It is said that this supplement cannot have an effect on the deed of David C. Stewart and Co. to Purvi-

ance, because the Law did not pass until after the deed was made; and therefore it is as to this deed an *ex post facto* Law. Without adverting to what I consider the correct application of that clause in the Constitution, (which declares no *ex post facto* Law shall pass,) to *criminal* Laws exclusively, I think I may be permitted to say, that if the Supplement of 1807 be an *ex post facto* Law, so is every Insolvent Law that has passed in the State of Maryland for many years. Every one of these Laws declares that if the debtor has done certain things *before* the passage of the Law, then he shall derive no benefit under it, clearly imposing a disability on account of something antecedently done. Thus if one of the persons named in the act of 1804, had, before the passage of the act, made a fraudulent conveyance with a view to benefit himself, or if he had lost 100 dollars by gaming, &c. he could derive no benefit under that act, and no one ever thought it to be an *ex post facto* Law on account of that provision. Or, if the act of 1805, had not been continued for five years, and an act had passed in 1807 in the usual way for the relief of persons whose names were recited in it, (David C. Stewart and Co. among others) containing the very words of the Supplement, instead of those in the 9th section of the original act, David C. Stewart and Co. would hardly have said that it was an *ex post facto* Law, or that when they asked a favour of the Legislature, the Legislature should not be permitted to grant it on such terms as they might think proper to prescribe. If such a provision might with propriety have been inserted in the original act, or if it might have been inserted in an act of a general nature passed in 1807, why could not the Legislature in 1807, prescribe the terms upon which future applicants for the benefit of the Insolvent Laws

should be discharged? All the Insolvent Laws have been for the benefit of persons who should afterwards apply to the Chancellor or to the County Courts, but they are expressly prohibited from deriving any benefit, if they have been antecedently guilty of certain acts of misconduct. The Supplement of 1807, as it relates to all cases similar to this, does nothing more than prescribe the terms upon which future applicants shall be released from the payment of their debts, and the Legislature were as competent to do this as to do any thing else. Before the Supplement of 1807 David C. Stewart & Co. had acquired no rights under the act of 1805, and the Legislature might have repealed it without an injury to them; if they were competent to repeal, they were surely competent to amend, and the supplement of 1807, must be construed as an amendment to affect all subsequent applications of insolvent debtors. The application of David C. Stewart and Co. for the benefit of the act 1805 and its Supplements, was not made till July 1808 and their rights, if indeed they have yet acquired any, could not have commenced before that period. They certainly did not commence with their misfortunes, or every man whose circumstances are now sinking may urge that he too has rights with which the Legislature must not interfere, and that therefore, the act of 1805 cannot be repealed before its limited existence of five years expires; nor indeed, that it cannot be changed or altered. If this claim on the part of the debtors is well founded, may not the creditors put in their claims too? May they not insist (as their debts were in existence before the several Supplements that have since passed giving to debtors a much greater facility in procuring discharges, than they at first had) that the Legislature had no right to interfere, and may they not

by urging their claim a little further, lay an axe to the root of the original act itself? In fact, a solemn argument has been made on the part of creditors, before the Court of Appeals on the Eastern Shore against the constitutionality of the insolvent laws, but without effect.

The only *plausible* objection that can be urged against the Supplement of 1807 is, that inasmuch as it declares the meaning of a provision in the act of 1805, it may be used to defeat rights antecedently acquired under it; and that persons who had before been discharged notwithstanding their having assigned their property to preferred creditors, might be afterwards held liable. But this objection need not to be examined here, as it does not apply to the case before us.

I have always thought that an assignment of property to one or more creditors to the conclusion of others, in contemplation of insolvency, was an undue and improper preference within the meaning of the act of 1805 and have heretofore, in the case of *Hawkins* and *Claggett*, given an opinion to this effect. But the Supplement of 1807 puts the question to sleep, as to all applications for the benefit of the Insolvent Laws made subsequent to its passage.

Hollingsworth J. concurred with the chief Justice as to the effect of the Supplement of 1807, and therefore deemed it unnecessary to make any further observations.

Habeas Corpus in case of Emanuel Roberts.

NICHOLSON, CH. J.* THE petition upon which the Habeas Corpus is sued in this case, contained a state-

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ment of facts verified upon oath, extremely different from those which have appeared in evidence. The petition stated that Emanuel Roberts the son of the petitioner had been seized, and forcibly carried on board the brig Syren, commanded by captain Gordon, and lying in the Basin of Baltimore, where he had been detained since the 10th of April. The statement detailed so gross a violation of Law, and intimated to the court something so extremely like impressment, that no hesitation was felt in granting a writ which every citizen illegally held in custody has a right to demand—If the facts as stated in the petition had been supported by evidence, the party detained must have been discharged, whether the detention had been by officers of the United States or others, and I would most certainly have held them to bail, to answer upon a criminal prosecution. But it appears as well by the return of the *habeas corpus*, as by the testimony adduced, that Emanuel Roberts had voluntarily enlisted in the service of the United States, and had received from the recruiting officers three months pay in advance: the question therefore necessarily arises how far this Court can take cognizance of the case. No man is more anxious to preserve, nor will more steadily persevere in the support of the State authorities, than myself—I consider the well adjusted balance between the general and State governments to be essential to the preservation of the blessings of each, and as in the exercise of my public functions, I will never suffer the general government or its officers to infringe such of the State rights as are trusted to me, so I hold it to be my duty not to interfere with the rights of the general government.

The constitution gives to the United States the power of raising and maintaining a navy: Congress have

by Law directed the President to enlist for the service of the navy, a certain number of men, and the brig Syren has been sent to Baltimore for the purpose of completing her crew. The whole of the evidence shows, nor indeed is the fact now pretended to be denied, that the party whose release is applied for, had enlisted in the service of the United States. It is therefore a proceeding under the authority of the United States. This court, however, is called upon to go further, and to enquire into the regularity of the enlistment, it being alledged that the party is only sixteen years of age, and was drunk when enlisted.

The power of the Court to examine into the regularity of the proceeding, is only contended for on the ground that the citizens of the State are entitled to its protection: that the writ of *habeas corpus* is all important to secure the liberty of the citizen, and that every man may claim relief under it. These positions cannot be denied, and might apply very forcibly to the case under consideration if there was no contract or agreement to service in question. To this contract the United States is one party, and an individual the other. Emanuel Roberts by an agreement in writing, signed by himself, has contracted to serve the United States for two years at a stipulated price, and has received a part of his wages. I know of no Law by which the United States can be made a party in a State Court, except only where special acts of Congress have given the State Courts jurisdiction, and if the United States cannot appear in a State Court to prosecute a suit in their own behalf, unless in cases specially provided for, how can we call them before us to enquire into the nature of their contracts with individuals, if in our judgement they shall appear to have

been irregularly made, or to be oppressive to either party?

An extreme case has been supposed, in which I acknowledge that I would interfere without hesitation. It is asked if a child of eight or ten years of age had been enlisted, would the Court refuse to discharge him? I answer no—I would discharge him because of his incapacity to make a contract, not an incapacity arising from the general principle that he who has not attained the age of twenty-one years, is incapable of binding himself, but from an actual imbecility of mind owing to his tender years. If in such a case I should exceed the technical limits of my authority, I should have the approbation of all good men for resisting oppression under the colour of Law—Emanuel Roberts is not of this description, and if he be only 16 years of age, he is remarkably well grown—Although it is a general rule that a person under twenty-one years of age, cannot bind himself by contract, yet I am far from saying that this rule will apply in its unlimited extent, to prevent young men from enlisting in the service of their country, or to authorize their discharge upon an application to the Courts of the United States. The history of our own times has taught us that young men under twenty-one years of age, if not the best, are certainly not inferior to any other soldiers in the world.

This case differs very widely from that of *Adair* and *Ogden* in which I did interfere and discharged the parties. They stated, in their petition, that they were confined in Fort M'Henry without the authority of Law, and prayed for a *habeas corpus*, which was granted them. It appeared on the return of the writ, that they had been arrested by general Wilkinson at New-Orleans on a suspicion of their being connected with

Burr in certain treasonable practices, and had been transported by sea to this place to wait the order of the Secretary at war. They were private citizens, not subject to military authority, and as there was not a shadow of proof against them, I was bound to discharge them from arrest. Whatever might have been my private opinion of their guilt, I was not at liberty to remand them into custody without some evidence furnishing a probable cause of suspicion against them. Presuming that some such testimony might possibly be in possession of the President, I wrote immediately to him, informing him what had taken place, and requesting him to send on any proof that he might have, upon the receipt of which I would issue a warrant and have them arrested. But I believe he had none. As general Wilkinson had no right to arrest them, his inferior officers of course could have none to detain them, and as there was no proof of their guilt before me, I had no power to commit them. The officers there acted without even the colour of authority; but here the whole proceeding is under the Constitution and Laws of the United States. I am therefore decidedly of opinion, that this Court has no right to interfere in the present case; and if it had, I am not very certain that I should discharge the party with a knowledge of the facts that have been proved.

John Carrere against the Union Insurance Company of Maryland.

[The desire which we feel to rescue from suspicion the name and character of a worthy man, and valued friend who has fallen a victim to his own good nature and the ignorance or corruption of a faithless translator, induces us to report the following case in a much more ample manner than is necessary for the illustration of its legal principle. To our readers this is the only apology which we make for the introduction of matter, which is certainly irrelevant to a mere report.]

THIS was an action on a policy of Ensurance, upon the cargo of the schooner Venus, in a voyage from Baltimore to Bourdeaux in France. The policy bears date on the fifth day of June, 1806, and contains a clause warranting the goods to be American property, with the usual stipulation confining the proof of neutrality to the United States.

The facts, as they appeared in evidence at the trial, and in the bill of exceptions taken in the case, are as follows:

On the fifth of June 1806, the date of the policy, Mr. Carrere had projected the voyage, and had provided the greater part of the cargo consisting of sugar and cotton. A parcel of this sugar, twenty-three barrels, had been purchased by him from James Chaytor, a native citizen of the United States, who had formerly sailed in his employment.

On the seventh of June 1806, Messrs. Caze and Richaud, merchants of New-York, and naturalized citizens of the United States, wrote to Mr. Carrere, directing him to sell for the best price that could be

obtained, one hundred and one bags of Carraccas cocoa, which had been consigned to him for their account. Having attempted in vain to sell it, at such a price as he thought proper to accept, he resolved to take it on his own account, at twenty-seven cents per pound short price, and to ship it in the Venus, as part of the cargo to be covered by the policy.

Pursuant to this determination he put this cocoa on board, with the rest of the cargo, on the 28th of June 1806. The cargo consisted of this cocoa, of the twenty-three barrels of sugar purchased from Chaytor, of forty-one hogsheads of brown sugar, forty-four hogsheads of clayed sugar, and two hundred and seventy bales of cotton. Regular bills of lading for the whole cargo, stating it to be the property of Mr. Carrere, were signed by the captain, and to one of them was annexed an affidavit, made before S. Sterrett on the 28th of June, by Mr. Carrere, declaring the whole cargo to belong to him. The bill of lading with this affidavit annexed to it, was put on board as one of the documents of the cargo.

This affidavit was strictly true at the time of making it; for having authority from Caze and Richaud to sell the cocoa, he had a right to become the purchaser himself, and his sale of it to himself, vested the property in him.

On the next day after shipping the cargo, and making the affidavit, June 29th 1806, he informed Messrs. Caze and Richaud, by letter of that date, that he had taken the cocoa on his own account, and shipped it part of the cargo of the Venus.

On the second of July the manifest of the cargo was signed and sworn to by the captain, and the vessel cleared out for her intended voyage.

On the same day Messrs. Caze and Richaud, having received Mr. Carrere's letter of June 29th, relative to the cocoa, wrote him an answer disapproving of the purchase which he had made of the cocoa, on account of the lowness of the price, and requesting that the shipment of it might be considered as on their account. This letter Mr. Carrere received on the 4th of July, before the schooner Venus had sailed.

About the same time, the 2nd or 3rd of July, James Chaytor called on him, and represented that the twenty-three barrels of sugar had been purchased at too low a price; for which reason he requested, as a favour, that Mr. Carrere would consent to recind the sale, and to let this shipment be considered as on his, Chaytor's, account. To this proposition Mr. Carrere assented, as well as to that made by Messrs. Caze and Richaud in their letter of July 2nd.

All these facts were proved by the original letters produced in Court, by the testimony of Mr. Richaud, and by the deposition of James Chaytor. These letters are subjoined to this report.

Mr. Carrere having consented to rescind these two sales, and to consider the cocoa and the twenty-three barrels of sugar as shipped for the account of Messrs. Caze and Richaud, and of captain Chaytor, omitted the regular steps which this change of property required. The papers and doeuments were then all made out, and on board. The vessel had cleared, and was on the point of sailing. It was the 4th of July a day of bustle, rejoicing and military parade, when it is extremely difficult to get any business done. He therefore, in the hurry of the moment, resolved to let all the papers remain as they were, and merely to mention in a letter to his correspondent in Bourdeaux, that the cocoa was the property of Caze and Richaud,

to be accounted for with them, and that the twenty-three barrels of sugar belonged to Chaytor, on whose account the sales were to be made, and the returns transmitted. This he accordingly did.

But in this letter which was written and dated on the 4th of July, he designated Caze and Richaud by the letter R, merely; and he omitted to state the manner in which the property had been transferred back to them and Chaytor, after the papers were signed and put on board—neither did he state that Caze and Richaud and Chaytor were citizens of the United States.

These facts and explanations certainly were not necessary to his correspondent, for which reason probably they were omitted; but he forgot that the vessel might be taken, and the letter read; in which case there would appear a contradiction between his letter and his affidavit. Being conscious of the truth of the the fact, he did not advert to the propriety and importance of placing it in such a situation, that it might always appear on an inspection and comparison of the papers.

An accidental circumstance led him into another errour. Sometime before that period a shipment of goods had been made by his correspondent, from Bourdeaux to the Isle of France. Bonds had been given in Bourdeaux, according to the laws of France, for the landing of the goods in the Isle of France, or some other French port. These bonds could not be taken up, without a certificate of the landing from the proper officers in the French port of destination.

Such a certificate had been obtained and sent to Mr. Carrere, who wished to transmit it by this vessel to his correspondent at Bourdeaux. But knowing that such a paper, found on board an American vessel, had

been made by the British a pretext for capture, and even for condemnation, he resolved to conceal it on board, in order to avoid this danger.

If he should trust it with the captain, and the vessel should be taken, the captain in his examination would be compelled to disclose it. If he hid it on board, and explained the manner of hiding it, in any letter on board that could be read, it would be the same thing as not concealing it. He therefore resolved that his letter of July 4th, in which directions were given for finding this paper, should be written in sympathetick ink. This was accordingly done. He first wrote the letter in common ink, and then caused it to be copied by his clerk in sympathetick ink, at the bottom of a short letter of no apparent importance, written in a feigned name, in common ink, and addressed to his correspondent in Bourdeaux by a feigned name.

This letter was then put on board of the schooner, and she sailed for Bourdeaux on the 4th or 5th of July 1806.

By this inadvertency on one subject, and over caution on another, Mr. Carrere suffered his vessel to go to sea with a concealed letter on board, containing the statement of a fact relative to the ownership of the cargo, which apparently contradicted his own affidavit.

It is evident that there was no motive, and could have been no design, to practice any concealment, much less any deception, as to the ownership of the cargo. Messrs. Caze and Richaud and captain Chaytor were citizens of the United States, as well as Mr. Carrere. Their property was as safe on the ocean as his; and ensurance on it could have been obtained on as easy terms. The plan of concealment therefore was manifestly contrived, to prevent the discovery

of the paper from the Isle of France, which had no relation to the cargo of the Venus, and was perfectly innocent in itself.

The schooner Venus was taken, and carried into Halifax, where the letter in sympathetick ink was disdiscovered. The apparent contradiction between that letter and the affidavit, though perfectly capable of being explained, as it in fact was in this trial, together with its being written in sympathetick ink, were considered by the Court of Vice Admiralty as circumstances, which ought to deprive Mr. Carrere of the privilege of further proof.

Another circumstance occured, which tended greatly to injure Mr. Carrere on the trial in Halifax.

The letter of July 4th which was copied in sympathetick ink, was originally written in French by Mr. Carrere. The copy in sympathetick ink was also in French. In this original letter Mr. Carrere, among other directions to his correspondent, gives him one in these words. "Donnez moi des avis prompt, et *annoncez* dans cet avis le probable depart *du navire*, a fin d'obtenir la prime d'assurance meilleur marchè a cause de la saison." The literal translation of which is, "give me prompt advices, and in these advices *announce* to me the probable departure of *the ship*, so that I may obtain insurance at a lower rate of premium, on account of the season".

Through mistake or design, it is to be hoped through the former, the translator for the Court of Vice Admiralty in Halifax, translated this passage of the letter as follows:—

"Give me speedy notice, and *antedate* in these informations, the probable departure of *the vessels*, that the insurance may be obtained on easier terms, as to premium, on account of the season."

By this false translation, Mr. Carrere was represented, as directing his correspondent to falsify dates and facts, in order to impose upon the Ensurance Companies, not only as to a single ship, but as to all ships which might be despatched to him from Bourdeaux. The French word "*annoncez*," written badly, may have been mistaken for the French word, "antidatez,"* by the help especially of that eagerness to find out causes or pretexts for condemnation, for which Prize Courts, and their officers, are too much distinguished. But Mr. Carrere produced at the trial, the original letter written by himself, from which the copy in sympathetick ink was made made, and proved it by the testimony of one of his clerks, who saw it after it was written, and saw it copied. This original letter and the translation made at Halifax, are subjoined to this report. An inspection and comparison of them will show that the translation, in this most material part is entirely erroneous.

On this testimony the defendants applied to the Court to direct the Jury, that the plaintiff was not entitled to recover. They contended in support of this application, that the plaintiff, by warranting the property in the policy to be American, had not only engaged that it was owned by American citizens, but also, that it should be accompanied by all the usual papers and documents to show it to be such; should be conducted in such a manner as not to forfeit its claim to the privileges of neutral property; and should be accompanied by no documents or papers, which might rightfully expose it to the danger of condemnation or detention. Assuming this as a correct principle, they argued that the plaintiff by putting on board,

[* I doubt whether there be such a word; but it was mentioned in argument.]

under such suspicious circumstances, a letter containing a statement respecting the ownership of a part of the cargo, apparently in contradiction his affidavit, had furnished justifiable ground of capture and detention, if not of condemnation, and had thereby violahis warranty of American property.

To this it was answered, on the part of the plaintiff, that the letter in sympathetick ink merely stated a part of the cargo to belong to other persons than the plaintiff, who for aught that appeared in the letter might be, and in fact were American citizens, as well as the plaintiff. That this letter, therefore, did not contain even *primâ facie* evidence, that the part of the cargo to which it related was not neutral but belligerent property, which is the meaning, intent and effect of the warranty. That, consequently, the letter did not furnish probable cause or justifiable ground for the condemnation, nor for the detention, of even that part of the cargo to which it related; and afforded no ground whatever for detaining the rest of the cargo, for which alone the action was brought, and which appeared by the letter itself, as well as by every document and paper on board, and by the whole evidence in the cause, to be the property of the plaintiff, an American citizen.

But the Court decided that the plaintiff, by putting this letter on board, had violated his warranty of neutrality, and therefore could not recover on the policy. The reasons for this decision were very ably detailed by the learned Judge himself, in the following opinion.

*Nicholson ch. J.** The facts in this case certainly do not come up to those existing in the cass of *Allibone* vs. *the Maryland Ensurance Company*, nor to those of

* Abs. Hollingsworth and Jones.

the case reported in New-York T. R. 549, in both of which the papers found on board the vessels, contained a direct assertion that the property belonged to belligerents. It is not so here: but although the facts are different, I cannot perceive how the difference can take this case out of the principles upon which those decisions were made.

The first principle laid down in *Allibone* vs. *the Maryland Insurance Company*, and which is the same as that contained in the New-York T. R. 564, is "that the property shall not only be accompanied with all the necessary papers to show its neutrality, but also that it shall be unaccompanied with any which may give it a colouring of a contrary character." It is now contended that these papers which give it a colouring of a contrary character must be, as in the other two cases, papers showing or stating it to be the property of belligerents. This, no doubt, would be correct, if the decisions of courts of justice rested, not on principles but on the mere circumstance of a subsequent case measuring in all its parts precisely with an antecedent one. It is needless to state that this rule does not and cannot govern. Two cases, each complex in its nature, are seldom found to agree in all their facts, and yet thousands are decided upon one and the same principle. It is the duty of the tribunal which is to decide, to bring every case on which it is to pronounce sentence, within some established principle of Law, and if it does not, the judgment will be erroneous.

What proof was there in this case accompanying the property to show that it was neutral? The invoice, the bill of lading and the oath of the party stating the whole to be his property, and stating also that he was a citizen of the United States. The manifest does not state to whom the property belonged. These were

all the acts of *Carrere* himself; for although the bill of lading was signed by the captain, yet it was at the instance and with the procurement and knowledge of *Carrere*, and must be taken to be his act.

If these papers had been the only evidence offered at the trial, before the Vice Admiralty Court of Halifax there can be no question, I think, but that the cargo would have been restored with the vessel. There was, however, found on board, a letter written by *Carrere* with sympathetick ink, stating about one fifth of the cargo not to belong to himself, as he had declared on oath, and as his other papers purported, but to belong to two other persons, one named *Chaytor* and the other designated by the letter *R*. neither of whom are declared to be American citizens. The circumstance of the letter being written with sympathetick ink, was, in itself, of a very suspicious nature. So far as it related to the cargo of the Venus, it had the appearance of containing something which the writer was unwilling should be communicated to any one but his correspondent, and more especially to those who, in all probability, would search for evidence to justify a capture and condemnation. It falsified also, in some parts at least, those documents which usually accompany the cargo to show its neutrality, by proving that although *Carrere* had sworn the whole to be his own, and that he himself was an American citizen, yet that one fifth at least belonged to others, of whose neutrality there was no proof, and whose names, for some purpose or other not known to us or to the Court of Prize were intended to be kept out of view. As to this one fifth, therefore, it may be fairly said that there was no document to show its neutrality, because there was a paper on board written by *Carrere* declaring it to belong to *Chaytor* and others, and they were not even

stated to be American citizens or neutrals of any other country. How does the case then stand as to the remaining four fifths? *Carrere* himself stood before the Court of Vice Admiralty as the only witness to prove the property to be his, or to prove that he was a neutral. He himself had falsified his own testimony in part, and it is a well established rule that if a witness is found to swear falsely in part, the whole of his testimony shall be rejected, unless supported by others, or by strong corroborating circumstances. It is true that he did not swear falsely as the case now turns out, but it appeared to the Court of Vice Admiralty that he had done so: the captain could give no explanation, there were no corroborating circumstances to support that part of the letter which related to the four fifths of the cargo, and in my judgement the Court were justified in rejecting the whole of his testimony. A tribunal less intent on plunder would, perhaps, have given further time to produce proof of the neutrality of the cargo, and would have restored it, if it had been eventually shown to be American property; but I think they would have been as much justified in detaining it, as if the vessel had been found at sea without any document to show the property she carried to be neutral. In fact she had no such documents, because those which were relied on were falsified *in part*, and therefore, not incorrectly rejected *in toto*. If it is necessary that the cargo warranted to be neutral, should be accompanied with documents to show its neutral character, which is not questioned, this cargo was certainly not within the legal import of the warranty.

The second principle contained in the opinion which I gave in the case of *Allibone* vs. *the Maryland Insurance Company* is probably embraced in the above

reasoning; but as the language of that opinion was said, in argument, to be too indefinite, and as its correctness was questioned even in its more restricted sense, I shall re-examine it here, because I consider it as bearing very strongly on this case.

I stated there "that whatever furnished a pretext for capture and detention would discharge the underwriters, unless that which is the pretext can be brought within the terms of the policy"; or, in other words, unless that which is pretended to be the true cause of capture and detention, is one of the risques insured against. *Mr. Harper*, in his argument supposed that the word *pretext* meant *probable cause of suspicion*, and the definition may be taken here as correct. But he thought the position untenable with this explanation, and urged, as I understood him, that "nothing would release the underwriters or falsify the warranty of neutrality unless it was an act which furnished justifiable cause of condemnation." This, certainly, cannot be well founded. A vessel and cargo are warranted to be neutral, by which warranty the assured contracts that they shall, on the voyage, be accompanied with documents to show their neutral character. These documents, however, are omitted, and the vessel is found at sea, by one of the belligerents, carrying a cargo evidently the produce of another opposing belligerent, and without any evidence whatever to show that although once a belligerent, it is now, *bona fide*, neutral. Here is probable cause of suspicion, and pretext for capture and detention, and it is furnished by the omission of the assured to send his documents with the vessel. As he had contracted to do this, his policy is void, for not having done it, but there is *no justifiable cause of condemnation*, because *other* evidence may be produced in the Prize Court to

prove the neutral character. The case of *Rich* v. *Parker* 7. T. R. 705. is completely to this point, nor is that of *Fitzimmons* v. *the New-Port Insurance Company* in the Supreme Court of the United States,* at variance with it. The probable cause of suspicion must be of something, which, if true, would justify condemnation. If the suspicion is not authorised by some act of omission or commission of the party assured, or his agents, then there is no *probable cause* furnished by them; and this was the ground on which the Supreme Court decided. The condemnation took place because the vessel *persisted in an intention* to enter a blockaded port, and neither the treaty between the United States and Great Britain nor the Law of Nations authorize the condemnation of a vessel for a *bare intention* to enter. There must be an *attempt* to enter, and the Court, although they admitted, for particular reasons, the conclusiveness of the foreign sentence, as to what it professed to determine, yet they did look into the facts found by the special verdict, to see if the captain had, by any act of omission or commission furnished probable cause of suspicion that he had attempted to enter, after being warned away. The condemnation could only be justified by an *attempt* to enter: no such *attempt* was made: the captain had furnished no probable cause to suspect that an attempt had been made, and the underwriters were held answerable. Not so in this case. Here the condemnation was on the ground of the property being belligerent: this was a justifiable ground, and though it was in point of fact, not true, yet the assured by not accompanying the cargo with proper documents to show its neutrality, or by falsifying those which did accompany it, furnished the captors with probable cause of

* Vid. Law Journal No. 5, ante.

suspicion, that it was not, what it professed to be, the property of an American citizen and therefore neutral. This risque the underwriters never meant to ensure against; and although the letter in sympathetick ink was not found until after the vessel was carried into port, yet being on board, it encreased the risque, authorized the detention, though not the condemnation, falsifies the warranty of neutrality, and, of course, discharges the underwriters.

I am therefore of opinion that the plaintiff cannot recover.

Verdict for the Defendant and Appeal.

Documents proved in this Cause.

New York, 7th June, 1808.

Mr. John Carrere, Baltimore.

SIR,

WE have received your esteemed favour of the 2nd instant, which advises us of the arrival of our mutual friend Mr. Francis Sequin, we have also duly received the accounts you sent us of that unfortunate adventure; the result of which is truly distressing for us. We cannot conceive how the suspenders could be so much damaged: the fact is, they were in very good *order* when they were sent from here. You may put this affair in the number of the unlucky ones.

As relates to the 101 bags cocoa which are the nett proceeds of that adventure, we wish you to sell them to the best of our advantage, even at a long credit, so as to facilitate the sale.

We have debitted you of 160 dollars for the return of premium of 4 per cent since the schooner Nimrod has only been in one port.

We are sincerely,

Yours, &c.

(Signed) CAZE & RICHAUD.

Baltimore, 29th June, 1806.

[TRANSLATION.]

Messrs. Caze & Richaud, New York.

GENTLEMEN,

I had not the pleasure to address you for some days, and I thought that my deferring to do it would enable me to announce you that I had affected the sale of your cocoa, but its quality being not in so great demand as the Laguira's, and that kind of produce being not otherwise very saleable in this moment, I could not succeed to dispose of it, but as you have manifested a wish to sell it here rather than have it shipped for Leghorn, (which is, I think, the best place for the disposal of such a kind of produce), I then thought proper to have it shipped for my own account, on board of a schooner that I have chartered for Bordeaux, and which was in want of 100 bags of coffee or cocoa to fill her up, which has mostly decided my disposing of your cocoa in my favour, and I think since its quality is a very common one, you will be satisfied with the price of 27 cents short price, and in order to make this business more profitable to you, I shall not charge you of any commission whatever; not of the disbursements I have made at the exportation of your goods for Maracaybo, neither at the importation of said cocoa; you will only have to pay for the premium of the ensurance I have effected on your goods from hence to Maracaybo and back: I hope gentlemen that you will be satisfied with my offer, and I am so much convinced of it, that I have already settled my papers, and the schooner Venus on board of which the said cocoa is shipped, will sail in a very few days; on your answer in the affirmative, I will forward you the account of sale of your cocoa.

Be so kind, gentlemen, as to send by the first opportunities the enclosed letters for New-Providence and Bordeaux.

I remain

Your most ob'dt servant,

(Signed) JOHN CARRERE.

New York, 2nd July, 1806.

Mr. John Carrere, Baltimore.

SIR,

We have received your favour of the 29th June, by which we see that you have not succeeded to dispose of our cocoa.—We have sincerely to regret not having ordered it to this place, where we would have had several times opportunities to sell it at 35 cts. You also announce us by your aforesaid letter, that on account of a full cargo you wished to give to a vessel you are sending to Bordeaux, you had been the purchaser of our 101 bags of cocoa, at the rate of 27 cents short price, and that you hope this price would meet our approbation; we candidly mention to you, that, at such a price, and although the favour you do us, to put us free from your commission and all charges this produce may have occasioned, (the ensurances from Maracaybo excepted) in its importation and exportation; we have to advise you, on account of the favourable opinion we entertain, that this produce will be advantageously disposed of in France, we beg you will consider the sale that you effected for yourself as *null;* we shall lose too much in the result of this sale: we then request you, sir, since that cocoa is already shipped for Bordeaux, to leave the adventure go on our own account and risk, the shipment being already effected, it will be necessary to make no change as relates the denomination of the property, unless this advice should reach you in time, which we do not presume; that way of exporting on our account that cocoa, will be more advantageous, and we are too much convinced of your principles of justice, to believe that you will not hesitate a moment to leave that adventure for our account which will be included in the ensurance you will have effected.

Please on this occasion to transmit us the account of charges that this cocoa has put you under, either at its arrival from Maracaybo, or at its exportation to Bordeaux: you will also oblige us by informing Mr. John Ducondu to hold at our dis-

posal the nett proceeds of the aforesaid 101 bags cocoa: your answer on all these points as soon as possible will oblige us.

Not having an early opportunity for Hamburg, we request you will send as soon as possible the enclosed letters for Messrs. John Shuback and Son; we also recommend in a particular manner those for Bremen, which have been delivered to us by a friend of ours. Please to forward them by the first vessel going to one of the ports of the vessels of the Hanse-towns: you will oblige us by letting us know the name of the vessel. You will also carry to our debit the postage, as we may sometimes trouble you in this manner.

Your letters for New-Providence and Bordeaux will be carefully forwarded; there is not yet any conveyance known for the former place, those for Bordeaux will be forwarded in four or five days by the ship Minerva, captain Lombard.

We hope that your next will remit us the account of ensurance that you have effected on our account on the brig Hercules and Mercury, meanwhile,

We remain,
Respectfully,
Yours,

(Signed) CAZE & RICHAUD.

THE LETTER IN SYMPATHETICK INK.

MON CHER D. Je me dispenserai de vous écrire longuement par cette occasion. Je n'ai aucune de vos lettres à répondre puisque vous me croyiez parti pour chez vous, l'ami Richaud m'a communiqué la substance de votre lettre du 17 Avril & qui me concerne en partie.

Dans la bque. No. 36, sous la queue de J. vous trouverês dans le fond le duplta. legalizé de l'acquit à caution déchargé à L'Ilê de France, du C. l'original vous à été envoyé par l'ami Rd. avec qui vous vous entendrés pour les 101 sacs cocao à bord de la Venus, dont le fret audus du connoissement est de £37 5s. 1d. ajouttés à cela 5 pr. ct. d'avaries & ce sera le men-

tant du fret de cet objét—-Les 23 barls sucre appartienent á James Chaytor et le fret est de £ 13 17s. 10d. que vous lui porterés en compte & le reste des marchandises est à moi—vous me crediterai du net produit de ces 23 barils—vous verrai par le fret énorme que j'ai été obligé de payer pour la Venus, la difference entre New York & ici—R. m'a informé que le fret de chez vous à New York étoit seulement de 45 shellings sterling. Dieu veuille que mon Vigilant á qui on a parlé à moitié traversée aprèz 12 jours de mer soit arrivé à bien & que sa cargaison ait passablement rencontré ; si la Venus rencontroit bien aussi vous aurés d'après mes calculs une forte somme à moi & mes derniers volontés sont que vous frettés la Venus, si au moins vous pouvéz ; obtenir ce petit batiment au cours du fret & que sans perte de temps vous le chargiés pour mon compte en bon vin nouveau en Bque. à 2 cercles dè fer, & seulement 8 à 20 Bques. de vin vieux supérieur 500 caisses vin rouge bien soutiré & bon & à ne pas revenir à plus de 12 à 13. 10—500 caisses vin blanc bien rafiné & bon & dans le même prix—100 tierçons vin blanc bien rafiné, 100 chandieres assorties en dimentions, 200 panniers d'huille de toute excellence, 200 caisses fruits au vinaigre, 100 panniers de fruits à l'eau de vie, des bouchons longs & superfins & non d'autres, quelques sacs de bouchons á damejeannes—50 pipes de bonne eau de vie, quelques malles de jolis souliers à femme il les faudroit un peu plus couverts & les bouts point pointus & en fin s'il reste des fonds envoyés moi des Bretagnes, larges & étroites superfines, du fil à Papillion le plus fin, du linon, enfin un assortment de marchandises de modes & du dernier gout propre à la consommation de ce pays & des colonies, car vendre ici est selon moi une bonne affaire and je vois que nos boutiquiérs sont obligés d'aller à New York, pour se procurer de pareilles marchandises dont Richaud à dû vous donner des notes exactes, s'il n'y à pas d'apparences de paix frettés un grand navire & forcès l'article vin, chaudierès enfin d'objéts propres au débouché des collonies si au contraire la paix est probable bornès vous à ne m'envoyer que de l'eau-de vie & remplissès les faux rangs avec du caissage je ne tir-

rai point sur vous & je vous sollicite de me reméttre par un ou plusieurs navires que vous fretterès, tous mes fonds mais au nom de Dieu ne perdés pas un instant, si la paix venoit à se faire on perdroit le capital sur le vin, au lieu que l'eau de vie augmenteroit. *Donnés moi des avis prompts & annoncés dans cet avis, le probable départ du navire, afin d'obtenir la prime d'assurance meilleur marché, à cause de la saison.* En frettant un navire envoyés moi par lui un cte. ou comptes de vente de marchandises, augmentés le prix de la vente afin que les remises que vous me fairés paraissent être les retours des marchandises que je vous ai consignées, car un navire fretté est plus sujet à êtrê pris que les miens & la cour de Halifax est abominable; par exemple les marchandises qui viendront par le Vigilant paraitront les retours de sa cargaison d'allée & les marchandises du navire fretté paraitront la balance dú Vigilant, le produit dés marchandises du brig Hannah & la Venus, mais prennez garde de faire cadrer tous les papiers par le Vigilant avec ceux du navire fretté; car il seroit possible que ces deux navires fussent ammenés à Halifax & dans ce cas il faudrait que tout cadrât, écrivés à la Manicle n'exposés par des volumes de papiers dans des malles mettés y seulement l'acquit à caution & ne vous chargés par de lettres qu'il faille cacher.

Je vous envoie une lettre pour C. & O. Durand--Je desire apprendre que vous ayiès fini avec eux pour mon objet.

Le Robert n'est pas encore arrivé ici n'y le navire dans le quel le cher oncle est, aussitôt son arrivée R. mà promis de l'amméner ici, j'aurai bien du plaisir d'embrasser ces deux bons amis agissés avec beaucoup de caution pour la nature des retoúrs--informéz vous bien s'il n'y à pas de probabilit éde paix, car encore une fois il y auroit de quoi se ruiner avec du vin.--le frere du médecin Chatard vous demandera quelque argent pour payer des livres qu'il lui demande, payès ce compte, debittés m'en fournissés m'en la note & envoyés moi les livres.

Toute reflexions faîtes paix ou guerre, si les eau de vie sont à bas prix, enfin, tel qu'en calculant tous les frais, frêt and assurances, droits ici, on puisse se permettre (engagnant quel-

que chose) de donner de l'eau de vie 4me. preuve de 100 à 120 cents. Je crois que ce seroit la meilleure remise & je crois aussi que si vous pouviez fretter un grand navire pour se rendre á La Rochelle & y prendre de 300 à 500 pipes d'eau de vie, cependant cette quantité arrivant dans deux navires différents rependroit mieux, les eaux de vie pourroit êtrê achettées à l'avance par la maison Garéché de La Rochelle & le navire envoyé pour les prendre. Je pense toujours aux eaux de vie, parceque dans la situation où est l'Europe la guerre dans mon opinion ne peut pas durer. Je ne vous parle pas de mes affaires de Paris. J'ai pourvû Arcambal (qui est parti de New York pour Nantes) de piéces qui je crois auront un grand poids, je n'ecris pas à personne, ny á mon beau freré, je n'en ai pas le temps & je n'aimé point à confier rien à des bâtiments frettés. Adieu, tout à vous pour jamais.

Baltimore 4th July, 1806.

Mr. John Duhalty, at Bordeaux.

SIR,

THE purpose of this letter, is to acknowledge the receipt of yours dated 25th April, which I have not time to answer by this opportunity but shall do so very speedily.

I have the honour to be,
Sir,
Your most humble servt.
MANICLE.

TRANSLATION OF THE LETTER IN SYMPATHETICK INK AS EXHIBITED AT HALIFAX.

MY dear Da. I shall not trouble myself with writing to you at great length, by this opportunity, I have no letter of yours to reply to, as you suppose me set out for your place. Friend

R—— communicated to me the substance of your letter of 17th April, which partly concerns me.

In the hogshead No. 36 under the tail of the J, you will find in the head, the authenticated copy of the discharge upon the security of the shipment at the Isle of France of the Ck.* the original was sent you by friend R. with whom you will settle for the 101 bags cocoa on board the Venus, the freight of which on the back of the bill of lading is £37 5s. 1d, add to this 5 pr. cent average damage, and it will give the amount of the freight of that article. The 23 barrels of sugar belong to James Chaytor, and the freight is £13 17s. 10d. which you will place to his account, and the remainder of the goods is mine. You will give me credit for the nett produce of these 23 barrels. You will perceive by the enormous freight which I am obliged to pay for the Venus, the difference between New York and this place. R—— informed me that the freight from your port to New-York was only £45 sterling. God grant that my Vigilant which was spoken with half way over, after being 12 days at sea, may have arrived in safety, and that her cargo may have come to a tolerable market; if the Venus should also be lucky, you will have according to my calculation, a large sum of mine in your hands, and my last will is, that you freight the Venus, if indeed you can procure that small vessel for the current freight, and that you load her without loss of time for my account with good new wine in hogsheads, with two iron hoops, and only 8 or 10 hogsheads of superior old wine, 500 cases red wine well flavoured and good, not to come higher than from 12 to 13. 10*fcs*; 500 cases white wine, well fined and good and at the same price; 100 tierces white wine, well fined; 100 boilers assorted in their dimensions; 200 baskets oil of the very first quality; 200 boxes of fruits in vinegar; 100 baskets of fruits in brandy; some corks long and superfine, and none other; some bags of corks for demi-johns; some demi-johns; 50 pipes of good brandy; some trunks of neat womens' shoes, they should be a little

* The Chesapeake vid. p. 204, post.

more covered and the ends not pointed; and in fine, if there be a surplus of funds, send me wide and narrow brittannias superfine of the butterfly thread; the finest of lawn; in short, an assortment of fancy goods of the first fashion, proper for the consumption of this country or of the colonies, for to sell here is in my opinion a good thing, and I see our shop keepers obliged to go to New York to procure such goods of which Richaud must have given you accurate information: if there be no appearance of peace, freight a large vessel and force the article of wine, boilers, in fine, commodities fit for the colonial market; if on the contrary, there be a probability of peace, confine yourself to sending only brandy and fill the void places with boxes.—I will not draw upon you, and I entreat you to remit me by one or more vessels you shall freight, the whole of my property, but in God's name lose not a moment—if peace should be concluded, one might lose one's capital on wine, &c. whereas brandy would rise. *Give me speedy notice, and antidate* in those informations, the probable departure of vessels, that the ensurance may be obtained on easier terms as to premium on account of the season.* In freighting a vessel on account or accounts of sale of goods, enhance the prices of the sale that the remittances you make me may appear to be the returns of the goods which I have consigned to you, for a vessel on freight is more liable to be taken than mine are, and the Court at Halifax is abominable. For instance, the goods by the Vigilant will appear the returns of the outward cargo, and the goods of the vessel to be freighted, will appear the balance of the Vigilant, and the produce of the goods of the brig Hanna and the Venus; but take care to make all the papers which shall come by the Vigilant totally with those of the vessel you freight: for it may be possible those two vessels may be carried to Halifax, and in that case it would be requisite that the whole should be consistent; write to La Manicle. Do not expose papers in the mails; put in them only the discharge on security, and take not upon you the

* In further proof of the inaccuracy of this translation it may be added, that there is no word in the French language which answers to the word *antidate*.

charge of letters which require concealment. I send you a letter for Ch. and O. Durand. I wish to hear that you have finished with them for my concern.

The Robert is not yet arrived here, nor the vessel in which comes thy dear uncle. R—— has promised to bring him here immediately on his arrival. I shall have much pleasure in embracing those two good friends. You will act with great caution in respect to the nature of the returns. Inform yourself correctly whether there be not a probability of peace, for I repeat it, wine might ruin one.

The brother of the physician Chatard will call upon you for some money to pay for some books which he has ordered of him, pay the demand, place it to my account, remit me a note of it, and send the books to me.

On second thoughts, peace or war, if brandies be at a low price, in a word, such as calculating all charges, freight, ensurance and duties here, would allow one to profit somewhat by disposing of brandy 4th proof at 100 or 120 cents, I believe it would be the best remittance; and I think too that if you could freight a large vessel to go to Rochelle and take in there from 300 to 500 pipes of brandy, however, that quantity arriving in two different vessels would answer better—the brandies might be purchased beforehand by the house of Garesche of Rochelle and the vessel sent thither to take them in.

My thoughts run constantly on brandy, because in the present situation of Europe, the war in my opinion cannot last. I say nothing of my affairs at Paris. I have for one Arcambal (who has set out from New York by the way of Nantz) documents which I believe will have great weight. I do not write to my brother-in-law nor to any body—I have not time and I do not like to trust any thing to vessels on freight—adieu, ever yours.

(Signed) JOHN CARRERE.

A faithful translation.

ARCHD. GRAY.

Sworn to before me the 4th day of September, 1806.

CHARLES MORRIS, *Register*.

☞ The shipment mentioned at p. 200 and 217 *ante*. was from Bourdeaux to Baltimore and not to the Isle of France as it was stated in some of the impressions before the error was discovered. It may not be amiss to give a further explanation of this, apparently suspicious, though really innocent, circumstance.

In order to induce neutrals to supply their colonies, the French government had passed a law permitting neutrals to ship merchandize of the growth or manufacture of France, without paying export duties. The shipper was obliged to enter into a bond to exhibit, within a year, proof that the cargo had been landed in a French colony. Mr. Carrere's correspondent had entered into such a bond on account of the cargo of the ship Chesapeake which belonged to him. The vessel arrived in Baltimore, where the cargo was landed, stored, and advertized for sale in the usual manner. Not being able to dispose of it, Mr. C. re-shipped it, excepting 62 pipes of brandy, for the Isle of France. The paper found in the hogshead No. 36. was nothing more than a certificate, *acquit à caution*, of the landing of the cargo in the Isle of France. It was necessary that this document should be sent to France in order to discharge the bond in which Mr. C's correspondent had entered.

Circuit Court of the United States.

PENNSYLVANIA DISTRICT, April Term, 1809.

Odlin *vs.* the Ensurance Company of Pennsylvania.

The following case was stated for the opinion of the Court.

THE plaintiff caused ensurance to be made at the office of the defendants by a policy dated the 21st of December 1807, upon the *schooner Hazard*, valued at 3500 dollars for a premium of 5 per cent. *at and from Philadelphia to Havana* prout policies and warranties. The policy was duly sealed by the defendants, the premium paid by the plaintiff, and the vessel is American property. The vessel with a valuable cargo on board cleared out at the Custom House of Philadelphia on the 21st December 1807, and sailed on the voyage ensured, but owing to head winds was obliged to stop at Reedy Island in the river Delaware, and while lying there waiting for a wind, she was arrested, stopped, detained, and prevented from proceeding by the officers of the revenue cutter, acting under the authority of the President of the United States in pursuance of an act of the Congress of the United States entitled, *An Act laying an Embargo on all ships and vessels in the ports and harbours of the United States*, passed on the 22d day of December 1807, which act was received and promulgated by the collector of the port of Philadelphia on the 24th of December 1807. The said officers took away all the ship's papers.

Being so as aforesaid prevented from proceeding on her intended voyage, the said schooner lay at Reedy Island until the day of when she was ordered to the city of Philadelphia, by mutual consent of the plaintiffs and defendants without prejudice to the rights or pretentions of the parties in any respect, and has since been sold by the same mutual consent for the benefit of whom it might concern. The plaintiff having received information of the said vessel being so prevented from proceeding on the 29th December 1807, communicated the same to the defendants on the next day, and repeated the notice on the 8th of Jan. 1808, and on the day of abandoned to the defendants and claimed payment for a total loss. The question submitted to the Court is, whether on the facts stated, the plaintiff is entitled to recover for a total or partial loss, or whether the defendants are entitled to judgment.

The case was argued much at length and with great ability by Hopkinson and Dallas for the plaintiff, and by Rawle and Lewis for the defendants.

Washington, J. delivered the opinion of the Court. The question is whether the embargo imposed by the government, to which the ensurer and ensured belong, subsequent to the commencement of the risk, furnishes a legal ground of abandonment. The question is thus generally stated, because it will be necessary to inquire, 1st. Whether such an obstruction is within the perils of *arrest, restraint and detainment, of Princes, &c.* and 2dly. Whether, if comprehended within those expressions, such a contract be repugnant to any principle of law. It is admitted that this precise case has never received a judicial decision in any of the Courts of Great Britain or of the United States,

although it has frequently been glanced at by the judges, from whom, however, nothing beyond hints of their opinions can be collected. We are sensible of the difficulty of the question as well as of its importance to the parties in this and other similar cases.—We derive consolation, however, from reflecting that our opinion, if wrong, is subject to revision elsewhere.

The first question to be considered is, whether a domestick embargo amounts to an *arrest, restraint*, and detainment of the government. That the expressions used in the policy are broad and strong enough in themselves to include the case of embargo generally, can scarcely be denied, and is established by the decisions which have taken place in relation to foreign embargoes. Still, however, the question remains whether an exception is to be implied in relation to an embargo, imposed by our own government upon the ground stated by *Valin* that no person is presumed to guaranty the acts of his own Prince without an express stipulation. How it should happen that this question should never have occurred in England, it is impossible for us with any certainty to determine.—This circumstance has been laid hold of by each side in this cause, and each has endeavoured to turn it to his own advantage. Arguments derived from this source in general cut both ways. Although neither can rely upon it as decisive in this case, we think the pretensions of the ensured to the benefit of it is best founded for the following reasons. It is believed that he is quite as apt to claim in every case where there is a chance of success as the ensurer is to resist; perhaps more so. It is not probable that the former would easily surrender a right for which the general expressions of the contract seem to afford at least a plausible ground, unless there were some evidence of a u-

sage to qualify and restrain the literal construction.—It is much more likely that the latter acquiescing in the natural import of the expressions would be induced to pay the loss without perceiving that on principle there could be a distinction between a foreign and domestick embargo. Another reason and one which has no inconsiderable weight with the Court is, that this seems to have been the opinion of the French Jurists; and although they may have been founded upon positive ordinances, yet it is probable they would be in this, as we know they have been in other instances, regarded by commercial men as evidence of the general law of merchants, upon this subject, no judicial decision and no custom appearing to the contrary. The sea laws and state ordinances of many of the maritime countries of Europe, have, with some exceptions, gradually became incorporated into the commercial laws of England, by a kind of tacit adoption, and are in those cases considered as evidence of the custom of merchants. These regulations are read in the British and American Courts, and have frequently furnished rules of decision, where the positive law of the country, or former decisions upon the point, had not prescribed a different one. Without taking time to go through in detail the different passages from Roccus, Le Guidon, Valin, Emerigon, and Pothier, we think it may fairly be deduced from what they say, that if a vessel be detained by an embargo, or other temporary restraint laid on by the authority of the French government, *after the risk has commenced,* the ensured may abandon; and the passages where they appear to differ, may be reconciled by considering them as sometimes speaking of a restraint imposed *before,* sometimes *after* the risk has commenced, or differing upon the point whether the words "*commencement of the*

voyage" in the ordinance of Louis XIV. mean what they express, or, *commencement of the risk.* These opinions taken in connexion with the unqualified expressions of the contract itself, create a presumption which is almost irresistible, that the absence of a positive English authority upon this subject has arisen from a general understanding among merchants and underwriters, that a domestick embargo, equally with a foreign one is a peril within the words of the policy.

In a case where no authority is to be found, the opinion of men learned in the law, and the *dicta* of judges, which in other instances should be relied upon with great caution, may not be improperly resorted to as corroborative evidence of the law. These will now be noticed. Much greater reliance might be placed on the *dictum* of lord Holt in *Green* v. *Young** if it had been purely a case of embargo; yet it is quoted by Park and Marshall as if the other circumstances of the case had not influenced the opinion. In *Rotch* v. *Edie*† it is obvious that lord Kenyon as well as the counsel on each side were not impressed with any distinction between a foreign and a domestick embargo. For the judge after stating that *Roccus, Le Guidon, and Green* v. *Young* are upon examination all one way, and that in favour of the assured, concludes by saying, that as to a domestick embargo there would perhaps be but little difficulty in deciding it. There can exist very little doubt on which side the inclination of his mind was. In *Goss* v. *Withers*‡ the expressions used by *lord Mansfield* are certainly very general, and although *Park* and *Marshall* have both pressed them into the service to support their opinions, it is not clear that he had in his view a domestick embar-

*2 Ld. Ray 840. †6 Term. Rep. 413. ‡2 Burr 694

go. In the case of *Hore* v. *Whitmore** there is every reason to infer that the opinion entertained by the bench and bar, was that a domestick embargo affords a cause of abandonment; because if the contract in that case was either suspended or put an end to as a consequence of that circumstance, it was perfectly immaterial whether the warranty had been complied with or not. In neither case could the ensured have recovered. In addition to all this, the opinions of Park and Marshall in favour of the right of abandonment are deserving of respect.

The cases relied upon by the defendants' counsel will be examined hereafter. At present it seems proper to inquire whether this construction of the contract is opposed to any principle of law, or to the sound policy of the nation. It is stated on the part of the defendants as a general rule, that where a contraet is lawful at the time it is made, and a law afterwards renders a performance unlawful, neither party shall be prejudiced, but the contract shall be considered as at an end. This as a general rule will not be controverted. But there is an obvious distinction between a law which renders the performance unlawful altogether, and one which merely *suspends* the performance, without condemning the subject of the contract. If the trade between this country and any other be wholly interdicted, or partially so in relation to particular articles, or if after the contract to carry goods from this to that other country, war should break out between them, the subject matter of the contract becomes unlawful; the prohibition acts directly upon it and forbids the performance. It is no answer that the prohibition may, upon a change of circumstances be re-

* 2 Cowp. 784.

moved; the prohibition defeats the contract and releases the parties from all its obligations. But in the case of a temporary restraint upon the performance of the contract, the subject matter of it is not declared to be unlawful; the trade itself is not condemned; the legality of it is rather admitted; but it is not permitted to be performed for the present. Here the rule applies, that if a law forbids performance of a contract in part only, he who is bound by it must still perform what he lawfully may. In the case of an embargo for example, the ship owner is disabled from commencing his voyage at the specified time; but he is bound to go when the prohibition is removed. A strict performance is prevented by law, and the law excuses it. What is an embargo. In its nature and design it imposes a temporary restaint; it is a measure of precaution and state policy, intended by the government either to distress some foreign nation or to protect the property of its own citizens. It is true that the embargo imposed by our government in December, 1807, was unlimited as to time by the terms of it, and the concurrence of the executive and legislative branches of the government was necessary to remove it. But it was still an embargo. It suspended our intercourse with foreign nations, but did not declare or mean to declare that intercourse in itself unlawful. The British embargo imposed on the 27th July, 1796, in relation to Tuscany was to continue *until the further order of the council*, and the Russian embargo was made to depend for its continuance upon the compliance of Great Britain with the convention on her part in respect to Malta. Both were dependent upon events which the governments imposing them could not controul, and the former did in fact continue between two and three years. Yet the nature and essence of the

measure was not changed. They were considered as temporary restraints which did not avoid but merely suspended the performance of contracts upon charter parties and for seamen's wages; the only cases which were brought judicially into discussion.

Let us now see whether a contract by one person to indemnify another against a loss arising from an embargo, which the government to which the parties belong may, at any future time impose, be inconsistent with the sound policy of the nation. If it be, it is admitted to be void. If such a contract be made pending the existence of the embargo, it is clearly void; because unless it is meant that the vessel should sail in defiance of the embargo, the contract itself would be nugatory. We do not speak of contracts to be performed after the restraint is removed. We can see no good reason why one man may not for valuable consideration and in relation to a real transaction concerning property, agree to stand in the shoes of another, as to any loss which may result to that other in case a measure of this sort should be adopted by the government. The effect of an interest created in one man by such a contract in opposition to the measure itself, is too remote as to its influence upon the conduct of the government, to be regarded. If a contract can be avoided because it may possibly become the interest of one of the parties at some future day to oppose the passage of a law which may then be thought beneficial to the state, it is not easy to foresee all the consequences of such a principle; because there is no supposable subject concerning which a contract may be made, which may not at some time or other become also a subject of legislative consideration, and it can seldom happen that any interference of the government in relation to that subject would

be equally beneficial to both parties. In the case of *Hadley* v. *Clarke** the contract of affreightment raised as strong an interest in the ship owner in opposition to the embargo, as if he had bound himself to indemnify the freighter against it. Yet this circumstance was not even thought of by the counsel who argued in opposition to the obligation of the contract. In *Touting* v. *Hubbard* † which respects the embargo laid by Great Britain on Swedish vessels; lord Alvanley declares in the most unqualified terms, that a common embargo does not put an end to *any contract* between the parties, but that it is to be considered as a temporary suspension of it only, and that the parties must submit to whatever inconveniences may arise, *unless they have provided against it by the terms of their contract.* He goes on to state the principle of *Hadley* v. *Clarke* to be, "that an embargo is a circumstance against which it is equally competent to the parties to provide as against the dangers of the sea." Now it is apprehended that in this case, the effect of the American embargo is provided against by the general terms of the policy, and these cases declare explicitly that such a provision is lawful. Neither is it perceived by the Court that an ensurance against a domestick embargo has a tendency to induce a violation of the law in case it should be enacted. If the ensured be at liberty to abandon, and to recover his indemnity, every temptation to a breach of the law to which he would have been exposed if not ensured at all, or if he were not at liberty to abandon, is taken away. If he were even bound by a warranty to depart by a certain day, still it could not be his interest to violate the embargo, because, by doing so, he would lose the benefit of the policy as certainly as he would have done by

* 8 Term. Rep. 259. † 3. Bos. and Pul. 291.

not complying with the warranty, and would stand precisely in the situation of one who had not ensured at all. Upon general principles, therefore, the Court is satisfied that such a contract would infringe no rule of law, and would in no respect be inconsistent with the sound policy of the nation. We agree with lord Alvanley "that there is no great reason why one British subject, may not ensure another against the effects of an embargo laid on by the British government—that the policy of the state is not concerned in preventing such an ensurance." 3 *Bos. & Pul.* 302. We cannot, however, yield our assent to the hypothesis stated by this learned judge and which was strongly pressed upon us by the counsel for the defendants in this cause, by which the individual is indentified with his government, in order to expose him to the rule of law that he who by his own conduct prevents the fulfilment of a contract, shall not take advantage of a non-performance on the other side. The doctrine is too refined to be safely applied to the common transactions between man and man. Were we to follow its light, it would probably lead us too far from those legal and practical principles in relation to questions upon contract which the wisdom of ages has matured.

A short examination of the authorities cited by the defendants counsel will close this opinion.

The general proposition laid down in *Salk.* 198. *Roll. Ab.* 451. *Dy.* 28. 1 *Ld. Ray.* 321. 1 *Mod.* 169 and some other books, that wherever a contract is lawful when made, and a subsequent statute makes it unlawful, the contract becomes void, has been already noticed, and the distinction taken between a contract declared to be illegal, and one the performance of which is only suspended. The quotation from *Park*

234 does not support the point contended for by the defendants counsel, that a domestick embargo puts an end to a contract of ensurance previously made and in operation. If it did, that authour would contradict an opinion which he had before expressed. In the page referred to, he obviously alludes to an ensurance made pending an embargo as is manifested from the case of *Delmada* v. *Motteux* which he cites in support of the principle.

The case *Kellner* v. *Le Mesurier* decides only, that an ensurance against capture generally, does not include a capture as prize by the government of the country where the policy was made, for a reason before acknowledged to be a sound one; because such an engagement *eo nomine* would be illegal being obviously repugnant to the interest of the state—It is for a similar reason that a policy is void if war should afterwards take place between the respective countries of the assurer and assured.

The case of *Lacoussade* v. *White** is certainly very strong. 2 *Ep. cases* 631 was looked at by the Court with a view to discover the ground upon which the wager in that case was admitted by the counsel to be illegal. We argue with lord Kenyon in the general proposition, that a wager or contract of any kind cannot support an action which is contrary to the policy of the state; but we are compelled to differ from him in the application of the principle to that case. *Allen* v. *Hearn* † and *Cotton* v. *Thurland* ‡ are referred to in the *nisi prius* report of that case. The first was the case of a wager between two voters as to the success of the respective candidate of each; and every person must yield his assent to the reasons assigned by

* 7 Term. Rep. 535. † 1 Term. Rep. 56. ‡ 5 Term. Rep. 405.

lord Mansfield against the validity of such a wager. The latter case was a wager upon a boxing match, the illegality of which cannot be questioned. It will be found very difficult, we think, to reconcile the principle admitted in *Lacaussade* v. *White* with that laid down in *Jones* v. *Raddall. Cowp.* 57. There is, however, this difference between the former case and that now before the Court. That is a mere gambling contract and no injury could arise to either party by declaring it void. This is a contract of indemnity against a real loss of property which a certain measure of government might produce.

Upon the most mature consideration which it has been in the power of the Court to give in this cause, we think that upon legal principles, upon the reason and policy of the thing, and upon a fair construction of the contract, the plaintiff is entitled to recover for a total loss.

Decisions in England on the same subject.

The Court gave judgment in the case on the American embargo, on Thursday last.

As they had not given previously any information of their intention to give judgment on that day; and, as it was the last day for delivering declarations of the last term, it so happened that I was not down in Court when judgment was given. But I found on inquiry, that the ground of giving judgment for the defendant in MAURY *vs.* SHEDDEN, was that when any act is done by the government of any country, it is to be considered in the same light as if all the subjects of

the country had individually concurred in doing the act; and as the plaintiff could not have recovered upon a policy when he had personally occasioned the loss, against which he sought to be indemnified; so, neither could he recover where his government had occasioned it; for that he was indentified, with his goment and the consequences as to third persons, were to be considered in the same point of view as if he had himself contributed to laying on the embargo.

The two other cases of CONWAY and DAVIDSON *vs.* FORBES and CONWAY and DAVIDSON, *v.* GRAY which were ensurances by British subjects, who were consignees of cargoes shipped by American subjects, and upon which they had accepted and paid bills drawn on account of the cargoes, depended in part upon the same general principles as that of *Maurey* vs. *Shedden*; but it was contended that there was a destination in favour of the plaintiffs, on account of their having a beneficial interest as consignees of the cargoes, and having paid bills upon them. But the Court thought that the destination would not bear them out; for the ensurance must be considered as being substantially made on account of the owners of the cargoes, who were Americans; and that the plaintiffs should not afterwards apply a policy which was originally made for the benefit of other persons to their own purposes, merely because they had obtained a subordinate interest in the cargoes by paying bills upon the faith of their coming into their possession and controul. They said if the plaintiffs had specially ensured their interest as consignees, as a distinct subject of ensurance unconnected with the general ownership of the cargoes, it might have admitted of a different consideration; but that they would give no opinion upon the effect of such en-

surance; and that was not the case where the ensurance was general.

(Signed) J. LITTLEDALE.

Gray's Inn, Feb. 15, 1809.

DAUPHIN COUNTY, PENNSYLVANIA.

AT a Court of Common Pleas, held at Harrisburgh, for the county of Dauphiu, the 13th day of September, 1806, before the hon. John J. Henry, esq. president, and John Gloninger, esq. one of the associate judges of the same Court.

The President, Managers and company of the Lancaster, Elizabeth and Middletown Turnpike Road,
vs.
Thomas Stubbs, a Stockholder in the said road.

Amicable action, $200. It is agreed, that judgment be entered for the above sum, subject to the opinon of the Court.

Whether under the act of assembly, incorporating the said company, passed the 5th of March, 1804—Thomas Stubbs, a stockholder in the said road, can be compelled to pay the different proportions of his several subscriptions as they become due. And if the Court should be of opinion that the several proportions can be recovered, that then judgment be entered for the plaintiff; but if the Court should be of a contrary opinion, then judgment to be entered for the defendant.

On motion and argument, judgment for the PLAINTIFFS.

Bills of Exchange in South Carolina.

Winthrop, *vs.* Pepoon, Otis and Company.

AN action will lie on a bill of exchange protested for non-acceptance, although the time for payment be not expired.

The *lex loci* where the bill is drawn, is the rule both for interest and damages on bills. The damages on bills in South Carolina which have been returned from foreign countries beyond sea is fifteen per cent, with the difference of exchange and *ten* per cent on those, which are returned from any of the sister states. The *custom of merchants* in Boston *seems to be*, to allow three per cent on inland bills protested.

On a motion for a new trial. The case appeared to be, that a bill of exchange was drawn by a partner in Boston, on his co-partners here, which came into the plaintiff's hands by indorsement. On the bill being presented, it was presented, and, of course, protested for non-acceptance. On which a suit was shortly after commenced, but before the time of payment had expired.

Ward, for the defendants, took too grounds: 1st. That the verdict in the former trial was against the law of merchants, inasmuch as it was founded on a protest of the bill in question for *non-acceptance*; and the suit commenced upon it before the time of payment had expired. 2ndly. That the Jury had taken upon them to allow ten per centum damages; which was neither allowed of by our act of assembly, nor any established usage or custom of trade.

N. B. The new trial was ordered in this case, not on account of any difficulty on the first part, but in order to have the point of damages established by a Jury of merchants.

Upon the first ground, the Court were clearly of opinion, that the action lay upon the protest for non-acceptance, although the time for payment of the bill was not expired. Every man by the law of merchants, who draws a bill, undertakes, by the very act of drawing, that the bill shall be *accepted* and *paid*, when at maturity, agreeable to the terms of the bill. And the very end and design of a protest, is, to give *notice of non-acceptance;* or, if accepted, of *non-payment;* in either event, the drawer becomes liable. And the holder in case of a protest for non-acceptance, is under no obligation to wait till the time for payment expires; because the drawer has broken part of his original contract—that is, that the bill should be accepted. And because also, if the bill should even be paid when due, the holder would lose the benefit of the credit in trade, which the acceptance of a bill would give him, as well as the use of the money, which he might obtain at a small discount. The obligation in every such case, would be on the part of the defendant, to show that the bill was afterwards paid, which might be given in evidence by way of mitigation of damages But in this case, no payment, even at this day is alleged; therefore, the plaintiff is entitled to a recovery. *Doug.* 55. 3 Will. 17. Kyd. 17.

2. Upon the second point, the Court had some doubts about the *quantum* of damages which ought to be allowed. Our act of Assembly for ascertaining damages on protested bills of exchange, allows fifteen *per cent* on all bills returned from foreign countries beyond sea, with the difference of exchange; and ten

per cent on bills returned from any of our sister states. But it is silent as to the damages to be recovered on bills drawn, either in a foreign country, or in any other state, and sent for recovery in our Courts in Carolina, as in the present instance. Therefore, in the former trial, the Court left it to the Jury, either to govern themselves by the reason and analogy of our own state law on the occasion, which they thought a good rule, or to make the *lex loci*, or law of the place where the bill was drawn, their guide, if they could ascertain what that was. Accordingly the Jury found ten *per cent* damages, which is the same as allowed on bills drawn here and returned protested. As the parties, however, expressed a dissatisfaction at this verdict; and as it was a new case, the Court had directed a new trial before a special Jury of merchants, who were now finally to settle this point; and therefore left it again to the Jury now sworn, either to make our Law on the subject their rule, or the Law and customs of Massachusetts where the bill was drawn, as they thought most agreeable to the Law of merchants.

The Jury then retired, and next morning returned their verdict for the amount of the bill, with interest and three *per cent* damages, agreeably to the custom of merchants in Boston, on inland bills protested.

This, therefore, may be considered as establishing the Law on this point, and making the *lex loci* or Law of the place where the bill is drawn, the rule.

Pennsylvania District Court.

Fogerty, Mate, Complainant, vs. *Pratt & Kintzing, owners of ship Atlantic, Respondents.*

MARINERS WAGES, 6 Jan. 1809.

Peters, jun. for complainant, and J. Ingersoll, for respondents.

PETERS J. At Norfolk in Virginia, the ship was discharging stone ballast. A flat bottomed scow was used as a lighter, to convey the ballast to the Strand.—The ballast was thrown into the scow from buckets, in which it had been hoisted out of the hold. These were borne to and off the side of the ship; both mates, at times, assisting. They were discharged into the scow lying along side at random, and their contents left to find their own position in the scow, or part to fall into the sea, as chance directed. No pains or care were taken to trim the scow which had a considerable list towards the ship's side; and was so left, with about six inches freeboard when the mate, second mate and all hands went to dinner. After their meal, they proceeded to discharge the ballast in the mode which had been previously pursued. Three buckets being (after dinner) emptied into the scow, she began to take in water; and not till then, did the mate (who commanded in the captain's absence) direct measures to be taken for trimming the ballast in the scow, though a hand might have been spared for that purpose from the commencement of her lading. She went down and was lost soon after the discharge of the third bucket. The mate's idea was, that the scow, before

any danger occurred, could be turned round, so that the off side might receive more ballast, and settle her on an even bottom. He viewed from time to time her situation; and so did the second mate, and most, if not all of the crew, though generally engaged at the tackle fall. No apprehension of danger was expressed on going to dinner, or at any other time, by any person. The second mate and some of the crew who were witnesses (under releases from claim of contribution) now declare, that the scow was injudiciously laden, and that a hand should have been kept in her constantly to trim the ballast. Being asked why they did not remonstrate at the time against the mode taken to lade the scow, they replied, that "the mate "was in command; and they had no right to inter-"fere; especially as he had high notions of his autho-"rity." He appeared to have been a strict, and therefore not a favourite officer.

The respondents set up a claim to the value of the scow lost, against the mate solely. The complainant's counsel contended that it was either a loss by unavoidable accident, for which neither the mate nor crew were responsible; or, if gross negligence appeared, or misfeazance, there should be a general contribution.

It was difficult to determine whether the mate was solely amenable and in fault; though I had no doubt as to the injudicious mode of loading the scow; which should have been more carefully attended to, as it was the first attempt to load this lighter. If the 2nd mate, or any of the crew had deemed (as the former said he had) this mode of lading the ballast uncommon, or dangerous, it was their duty to have represented the matter to the mate. If they had so done, and he had persisted, it would indubitably have been at his sole

risk. By not thus representing or protesting against it, they took their share of risk and responsibility.— It is a mistaken notion among mariners (many of whom are disobedient enough in plain cases) that they are compelled unconditionally to obey all orders.— This is not seldom an affectation of strict duty; and they obey orders evidently wrong, or perceive in silence ruinous omissions, when the consequences are the exposure of officers they dislike. But this is a nice and dangerous game. If a casualty producing loss occurs, they share in the retribution; notwithstanding such insidious obedience, and hypocritical delicacy. They are bound, by a superiour duty, to guard the property of the owner. The law thus reconciles obedience with justice, by making it their duty to remonstrate and warn on proper occasions, before they obey; under the penalty of sharing the consequences. But if they give due warning and information they are free from participation in retribution for loss. Thus it has often been decided here,* in cases of bad stowage, bad ropes, or other defective tackle and furniture. Their remonstrances are not to be considered as impertinent interferences; but just and warrantable exercises of their rights and duty.

In the case in question, no warning or opinion was given; and the whole were thus inculpated. An officer may err in judgment, without perceiving the consequences. It is the interest as well as the duty of those who must respond with him to the owners, at least to endeavour to set him right. If he persists in errour, it is solely at his own peril. There have been

* See Admiralty decisions in the District Court of Pennsylvania, p. 258, 263, &c. for the general duties of Mates. *Wilson, Mate, vs. brig Belvidere.* Ib. 243, as to claims of exceptions from contribution, and vide 240, 260, as to the duty of seamen to remonstrate.

cases of exception to this rule, attended with special circumstances. If, in this case, the lighter had been (as was alledged but not proved) rotten and incompetent, the owner or his agent, must have suffered the loss. The officers and crew would not have been liable to contribution, unless they, or some of them, knew the circumstance, and failed to warn or remonstrate to the master or mate, who in such cases, may be ignorant of the deficiency. The general contribution is first regarded. Strong circumstances must exist to charge an individual; and those of this case do not seem to be so strongly marked as to warrant an exception. At least, doubted whether the proof amounted to errour in judgment or *erasa negligentia.* But being clearly of opinion that there had been *misfeazance;* and no warning or protest, I deemed it right to retribute the owner by general *contribution.* This must be made in the ratio of wages. The master and the whole of the ship's equipage, must contribute.— Where the fault is not clearly fixed on an individual, the obligation of the whole to retribute the owner predominates; and prevails against any allegation of innocence, as to any one or more of the officers or crew. This may bear hard on the faultless; but it is the policy of the maritime law, thus to compel the innocent to watch, and bring to retribution or punishment, those who are really chargeable with negligence, delinquency or crime. This obligation arises out of a peculiar necessity, appropriate to those of this occupation; who, from the nature of their employment, are thus made sponsors for each other.

An Analysis of the Insolvent Laws of Pennsylvania,

By an Act of Assembly passed on the 4th of April, 1798, revived by an Act passed on the 26th day of March, 1808, it is provided:

§ 1. ANY debtor, having been an inhabitant of this State for two years next before his application, may apply by petition in writing, to the Judges of the Supreme Court, or to the Judges of the Court of Common Pleas of the county where the debtor resides, in term time, and offer to deliver up to the use of his creditors, all his property, real, personal and mixed, to which he is in any manner entitled, a schedule whereof (on oath or affirmation) together with a list of his creditors, so far as he can ascertain them and the nature of their debts, shall be exhibited with and annexed to his petition. Thereupon the Court may direct personal notice of such application to be given to the creditors, or so many of them as can be served therewith, or direct notice of such application to be published in the public newspapers, for such time as the Court may think proper. On the appearance of the creditors, or their neglect to appear on notice, at the time and place appointed, the Court may administer the following oath or affirmation, to the debtor making such application: "I, AB, do swear, or solemnly, sincerely, and truly declare and affirm, that I will deliver up, convey and transfer, to my creditors all my property, that I have or claim, any title to or interest in at this time in the world, and all debts, rights and claims, which I have at this time, or that I am in any respect entitled to, in possession, rever-

"sion, or remainder, and that I have not, directly or "indirectly, at any time before, given, sold, convey- "ed, leased, disposed of, or entrusted any part of my "property, rights, or claims, thereby to defraud or de- "feat my creditors, or any of them, or to secure the "same, to receive or expect any profit, benefit or ad- "vantage thereby."

§ 2. The insolvent shall, thereupon, exhibit to the Court, a just and true account of his debts, credits and estate, real and personal; containing a statement of his losses, and the means whereby he became insolvent; and shall satisfy the said Court, that he has not concealed or conveyed to any person or persons whatsoever, to the use of himself or any of his family or friends, or whereby to expect any future benefit to him or them, any part of his estate, effects or credits; and shall answer all and every such questions or interrogatories, touching his estate and losses, by word or in writing, as shall be put to him by the Court, touching his estate or losses aforesaid; and, if upon such examination, there shall not arise strong presumption of fraud, the Court, whether sitting at its regular sessions, or at *nisi prius*, or at adjournment, shall appoint such trustee, or trustees, on behalf of the creditors, as two thirds in number and value of the creditors, who are then attending, either in person or by attorney, shall nominate, or in case the creditors shall not attend, or not nominate any trustee, then such trustee or trustees as the Court shall think proper, and shall direct the debtor to execute a deed to such trustee or trustees for all his property, debts, rights and claims, in trust for his creditors, and upon the execution of such deed, the Court may make an order, that the debtor shall not at any time thereafter be liable to imprisonment, by reason of any judg-

ment or decree obtained for payment of money only, or for any debt, damage, cost, sum or sums of money, contracted, accrued or occasioned, owing or becoming due before the time of such assignment, and such order shall be a sufficient warrant to the sheriff, goaler, or keeper of the prison, where any such debtor shall be then imprisoned, to discharge the said debtor.

§ 3. Provides, That every trustee, before he acts, shall give bond with security to the Commonwealth, in such penalty as the Court shall direct for the faithful performance of his duty, and in case of his refusal, or delay to act, or of his death, the Court are authorized to appoint another in his stead.

§ 4. Exempts the necessary wearing apparel and bedding of the debtor and his family, and if a mechanic or manufacturer, his tools, not exceeding in value $50.

§ 5. Authorizes the trustees in cases of dispute or controversy with the debtors of the insolvent, to compound by arbitration or otherwise, and all such debtors are to have the benefit of a defalcation, where there are mutual debts, in like manner as in other cases.

§ 6. Provides that the trustees shall collect the debts, and sell and convey all the real, personal and mixed property of the debtor, for the best price that can be gotten for the same, and distribute the net produce, after paying all expences attending the execution of the trust, and deducting the commissions of the trustees, to and among the creditors, in proportion to the amount of their debts.

§ 7. Authorizes the trustees to sue for the recovery of any property of the debtor in their own names; and provides, that suits commenced by the debtor, before his discharge shall not abate.

§ 8. Provides that the trustees shall appoint a time and place for receiving the proofs of the creditors, in support of their claims, and for the distribution of the debtor's estate, and shall finally close their accounts at such time, not less than three months nor more than twelve from the date of the assignment, unless the same shall be enlarged by order of the Court, after which time every creditor is barred from claiming any share in the distribution of the estate; except a suit may be depending or any part of the estate may remain undisposed of, or any future effects or estate of the debtor may be received, in which cases the trustees are, as soon as possible, to convert the estate or effects into money, and distribute the same within three months after among the creditors. Due and full notice shall be given of the several times and places of the meetings of the trustees for the purposes aforesaid, by advertizement in at least two of the public newspapers in the city of Philadelphia, and one nearest to the place where the debtor usually resides, for four several weeks at least, before such days of meeting.

§ 9. If any person, with intent to defraud all or any of his creditors, shall collude or contrive with the debtor for the concealment of any part of his estate or effects, or for giving a false colour thereto, or shall contrive, or concert any grant, sale, lease, bond, acknowledgment, or other like proceeding, either by parole or by writing, or shall become a grantee, purchaser, lessee, obligee, or other like party, in any fraudulent intent, act as broker, scrivener, factor, agent, or witness, in any proceeding as aforesaid, such persons shall, on being duly convicted according to Law, forfeit and pay a sum not less than 50 dollars nor more than 10,000 dollars, and shall suffer imprisonment for

a term not less than three months, nor more than two years, and shall moreover, forfeit all claim which he may have to any part of the estate of such debtor.

§ 10. If at the time of the appearance of the debtor and his creditors before the Court, or at any time within seven years thereafter, any creditor or other person shall by oath or affirmation show to the Court, or any judge thereof, or to any justice of the peace of the proper county, in vacation, any good cause to suspect that such a debtor hath directly or indirectly sold disposed, &c. any part of his property, or any part of his debts or claims, thereby to secure any benefit to himself, &c. or to deceive or defraud his creditors, the Court, Judge or Justice shall bind him over to appear at the next Court of Quarter Session, to answer for the same by indictment; and all proceedings for the relief of the debtor, if pending, shall in the meanwhile be stayed, and upon conviction the debtor shall be sentenced to imprisonment at hard labour, for a term not less than one, nor more than three years.

§ 11. At every meeting of the trustees for the purpose of making dividends, creditors may prove their debts; every trustee shall produce on oath or affirmation his accounts, and after deducting expences, &c. divide the balance among the creditors who have proved their debts, proportionably.

§ 12. The surplus, after paying creditors to be restored to debtor, and any estate not sold to revert to him.

§ 13. The commissioners to the trustees shall be such, as the Court shall direct.

§ 14. If any debtor in vacation shall be arrested in execution, and shall apply by petition, to any judge of the Supreme Court, or the president, or any* two

* Second Sect. of the Reviving Act.

justices of the Court of Common pleas of the county where the debtor resides, and give bond to the plaintiff at whose suit he is arrested, in such penalty and with such security as shall be directed and approved of by the judge or judges, to whom the petition is exhibited, conditioned that he shall appear before the Court of which the Judge is a member at the next term, and surrender himself to prison, in case on his said appearance, he does not comply with every thing required by the act to procure his discharge, in the same manner as if he had applied in term time, or if the proceedings should be stayed by information on oath or affirmation as aforesaid, then, that if on trial, the debtor should be found guilty, he shall immediately surrender himself to prison; in such case and on such bond given, the judge or judges may set him at liberty forthwith, by an order to the jailer.

§ 15. Any sheriff, jailer, or keeper of any prison, performing the duties of his office in this respect, may make return of such order which is to be good and effectual to all intents.

§ 16. All proceedings of the trustees, together with the accounts and vouchers exhibited to them, shall be filed among the records of the Court appointing the trustees.

§ 17. If any debtor discharged as aforesaid shall be arrested for any pre-existing debt, upon application to any judge of the Court, out of which the process issues, he shall be discharged. Provides likewise, that the discharge under this act, shall not discharge him from the debt, but that he shall be always answerable, and that the liens against his estate shall not be affected.

§ 18. That * *all persons* that now are, or hereafter shall be in actual confinement in any jail in this Commonwealth by adversary process, and without collusion may at the next term after such confinement, petition to be discharged agreeably to the true spirit and meaning of the aforesaid sections of this act.

§ 19. Directs that the property afterwards acquired by the debtor, shall be liable for the payment of his debts and creditors, may take out new executions, &c. It, however, excepts his wearing apparel, and bedding for himself and family, and if a mechanic or manufacturer, his tools not exceeding in value $50.

§ 20. Limited the Law to the 1st of May, 1801.

By the first section of an act, passed the 26th of March, 1808, the foregoing act was revived and continued in force for one year, and from thence to the end of the next session of the general assembly, which will be about the month of April 1810—It is, however, doubtful whether the ensuing Legislature will continue it longer.

2. The second section of this act gives to one judge the same power as is given to two judges by the 14th section of the foregoing act.

§ 3. It shall be lawful for the Court by whom any insolvent shall be discharged, to decree and adjudge that whenever a majority in number and value of creditors residing within the U. S. or having a known attorney therein, consent in writing thereto, he shall be released from all suit and his estate and property afterwards acquired, exempted from execution for seven years.

* "All persons"—there has been a contradiction of decisions relating to this section. Some of our Courts deciding, that any person in actual confinement may be discharged, while others limit the benefit of the act to persons who have been inhabitants for two years.

By a Law passed on the 7th of April, 1807 and yet in force, it is provided by

§ 1. That the jailer shall be compensated for his fees before any distribution.

§ 2. That it shall be the duty of the several Courts of C. P. at their first term in every year, to fix and order a daily allowance, for all such poor and insolvent debtors as shall or may be confined during the year, and have not property to support themselves; and it shall be the duty of the plaintiff at whose suit he is arrested, his agent or attorney, upon notice given by the keeper of the prison, to pay the daily allowance at the prison every Monday morning, while the debtor continues in prison, on failure whereof for three days, the debtor may apply to the Court if in session, or if not, to a single judge, who upon enquiry and finding him destitute of property for his support, and failure of payment, shall forthwith order his discharge, provided the daily allowance shall not exceed fourteen cents.

CIVIL LAW.

(TRANSLATED FOR THE AMERICAN LAW JOURNAL.)

Continued from Vol. I. page 491.

A Translation of the Fifth Title of the Forty-seventh Book of the Digests, entitled: Furti adversus nautos, coupones, stabulanos.

DIGEST, Book XLVII. Tit. V.

Of the action of Theft against Mariners, Inn and Stable Keepers.

LEX UNICA*.

Ulpianus, lib. 13. Ad Edict.

In cos qui naves. I shall give judgment against the owners, masters and keepers of vessels, inns and stables, if any thing shall be stolen by them or by any person or persons in their employ; whether the theft shall have been committed by the aid or with the privity of the owner or master of the vessel himself, or only by those who are employed under him for the purpose of navigating her.

Navagandi autem. § 1. We mean those who are actually employed in navigating the vessel, to wit, mariners.

Et est in duplum. § 2. This action is twofold:

Cum enim. § 3. For when a thing perishes either on board of a ship, or in an inn, the owner, master or keeper (*exercitor*) is bound by the prætor's edict; so that it is at the election of him whose property has been

* This Title contains but one Law.

stolen to proceed against such owner, master or keeper *honorario jure*, or against the thief *jure civili*.

Quod si receperit. § 4. If the ship master or inn keeper has received the thing *to be safely kept*, then the action of theft does not belong to the owner of the thing stolen, but to him who has undertaken to keep it at his own peril.

Servi verò. § 5. The *exercitor*, however, may liberate himself from the action of indemnity, by delivering up his slave who has committed theft; yet why should he not be punished who admitted on board of his vessel so bad a servant? Why is he jointly and severally bound, when the theft has been committed by a freeman? Unless, perhaps, it be for this reason, that before he takes a freeman on board of his vessel, he ought to be informed of his character; but that he ought not to be charged with the act of his slave, it being a domestick misfortune, provided, he is willing to give him up. If, however, he employed another man's slave, he is liable as for a freeman.

Caupo præstat. § 6. The inn keeper answers for the act of those who are in his house, employed in the service and management thereof, and also for those who dwell therein as *inmates*; but he does not answer for the acts of *travellers*, because he has not the choice of them and cannot turn them out; but of his *inmates* he has so far the choice that he may refuse to take them in, and therefore, he must be answerable for their acts. In like manner the master of a vessel does *not* answer for the acts of *passengers*.